Jury Matters

The Newsletter for the
Civil Jury Project
at NYU School of Law

June ‘18, Vol. 3, Issue 6

Upcoming Events

6.22 Jury Improvement Lunch; Seattle, WA

9.5 Jury Improvement Lunch; Las Vegas, NV

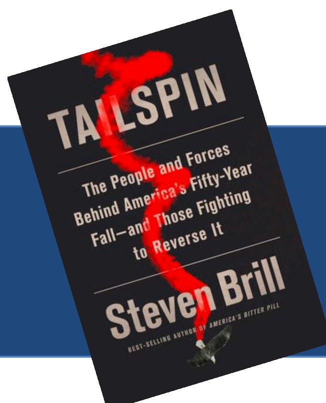
9.6 Jury Improvement Lunch; Oklahoma City, OK

9.7 Jury Improvement Lunch; Miami, FL

10.3 Jury Improvement Lunch; Los Angeles, CA

10.4 Jury Improvement Lunch; Tucson, AZ

10.23 Jury Improvement Lunch; New York, NY



Opening Statement

Dear Readers,

Welcome to the June edition of the Civil Jury Project's monthly newsletter. In recognition of Juror Appreciation Week in May, the Civil Jury Project continued to organize Jury Improvement Lunches around the country. After hosting successful Jury Improvement Lunches in Baltimore, Cleveland, and Columbus at the end of April, we continued this momentum. The Civil Jury Project hosted our third lunch in Dallas and fifth lunch in Houston, Texas. Each of these lunches was well received by the attorneys, judges, and jurors in attendance. Later this month we are planning a second Jury Improvement Lunch in Seattle after a fantastic turnout the first time around.

In mid-May I also had the privilege of delivering a speech on the disappearance of civil jury trials to the Eighth Judicial District Conference. Judge Brendan J. Sheehan of the Cuyahoga County Common Pleas Court wrote a summary of this event, which we are enclosing with this month's newsletter. We hope you find it as informative as our audience in Cleveland did.

Thank you for your continued support of the Civil Jury Project. You can find a full and updated outline of our status of projects on our website. In addition, we welcome op-ed proposals or full article drafts for inclusion in upcoming newsletters and on our website either by email or here.

Sincerely,
Stephen D. Susman

A Sneak Peek: Steven Brill's Critique of Arbitration Clauses

Arbitration clauses have a long history and pernicious effect on ordinary citizens' and consumers' right to a day in court. Steven Brill takes us on a whirlwind tour of the rise and staying power of these clauses in America.

Find out more on pg. 5

The Value of Lawyer-Conducted Voir Dire

By Mark W. Bennett

On May 7, 2018, I presided over a 6-day jury trial in Fargo, North Dakota, as a visiting judge, where the race (Black) of a party was highly salient in the case. I correctly anticipated an all-White venire. Because many of my trials, in Iowa, involve persons of color as a party, I pride myself in my ability to discuss race with prospective jurors. I address the issue head-on with a variety of open-ended questions rather than taking the ostrich approach of many trial judges. In fact, I was the first trial court judge in the country to discuss implicit bias with jurors, play a video that introduces the topic, and give jury instructions on it.

The prospective jury panel was exceptionally attentive. Not a single potential juror thought it would be too burdensome to serve. I never want jurors who do not wish to be on the jury to serve, so I give them several paths to be excused. None accepted. After extensive, open-ended questions by me about the race issue, there was neither a hint nor a whiff that any potential jurors could not be fair.

Then the lawyers took over. Good, solid, experienced North Dakota trial lawyers. There was nothing unusual about their questioning, no secret sauce question to ferret out potential racial bias. But that is exactly what they did. Largely re-plowing ground that I had already covered, we lost ten jurors during questioning by both sides – all because of expressed juror concerns about the ability to be fair to a Black party. The lawyers and I could tell these were not folks trying to get out of serving their country as jurors, but honestly struggling with their own feelings. All were excused by agreement between me and the lawyers.

For reasons I do not understand and perhaps never will, the potential jurors were freer in disclosing their concerns to the lawyers than to me. Perhaps I planted some seeds for them to percolate on as the all-day jury selection* proceeded or perhaps I am delusional in taking any of the credit.

During my over four decades career in the legal profession, I have always been a huge believer in lawyer-conducted voir dire in addition to questions by the trial judge. It is the lawyers' case, and a judge can never know a case better than the lawyers, even relatively inept ones. In my 24 years as a district court judge, presiding over jury trials in 6 different jurisdictions spanning the Northern District of the Mariana Islands to the Middle District of Florida, I have never found a lawyer to abuse the opportunity to question prospective jurors. I encourage trial judges to trust lawyers and promote lawyer-conducted voir dire.

On a related note, I have been experimenting with an idea I learned from United States District Court Judge Tom Marten in Wichita, Kansas. A brilliant innovator, he has demanded that the lawyers give their opening statements to the entire jury venire prior to jury selection for decades. I introduced this amazing innovation in two recent cases and the lawyers loved it. In both cases we were able to ferret out bias in jurors that never would have come to light without opening statements being given prior to voir dire. More kudos to my friend, Judge Marten.

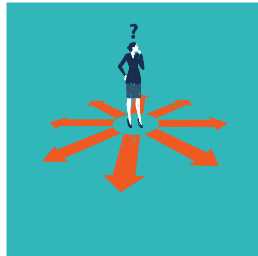
Mark W. Bennett is in his 24th year as a U.S. District Judge in the Northern District of Iowa.

* Jury selection took all day due to the absence of a thorough questionnaire for the prospective jurors. In my home district, we use a seven-page questionnaire that all potential jurors fill out weeks before trial and our Clerk's Office provides these to the lawyers a week in advance of trial. The questionnaire encompasses all relevant biographical information about the prospective juror and his/her family, as well as questions about favorite magazines, radio, TV, frequented internet websites, and participation in organizations, to name a few.

Reduce Uncertainty by Taking your Trial Venue's Temperature:

The Role of a Community Attitude Survey

By Ken Broda-Bahm



One reason trial by jury is falling out of favor in civil disputes is that parties and counsel treat it like the ultimate mystery, and this uncertainty makes the alternate ways to resolve the dispute look a lot safer. The jury is sometimes considered a "black box," and the phrase "A jury can do anything," is often on counsel's lips as expectations with clients are being set. That can be a little off-putting, and of course, that is often the point: The client who sees a big verdict in their favor as a sure thing, probably does need that reality adjustment. At the same time, treating a jury trial as if it is casting a pair of dice into the unknown is probably overselling the uncertainty.

Ultimately, jurors are not really that unpredictable. After all, a jury doesn't just come out of nowhere. They come from the community. Understanding that community -- the local attitudes and experiences *as they relate to the issues at play in your particular case* -- is an important uncertainty reduction strategy. Client, counsel, and consultants are better armed with the aid of a relatively simple and low-cost tool: a community attitude survey conducted prior to jury selection.

Conducting a community attitude survey means using telephonic or online polling within the juror-eligible population in your trial venue to discover and use the particular attitudes and beliefs that characterize your venue. Unlike the special purpose surveys associated with a change of venue motion, community attitude surveys are conducted with an eye toward remaining protected work product which is used to inform the attorney's strategy for trial. Many of the barriers that can pull attorneys away from other consulting services aren't present with the survey: They're not typically high dollar, usually don't involve long-term planning and advance notice, and rarely take much if any time from the attorneys. But they can be enormously useful in choosing your trial venue, assessing knowledge or attitudes regarding your case, providing a baseline for focus group or mock trial research, and in developing questioning strategy for voir dire.

Conducting a Community Attitude Survey: Four Steps

Actually conducting the survey takes four steps, each one of them aided by the involvement of a social science researcher.

One, Know What You're Researching

That means developing research questions in advance. The point isn't to just broadly know the community — chances are good that an experienced local counsel already knows their community. Rather, the goal is to look at the specific case issues and decide what uncertainties attach to this particular scenario. For example, in a construction case, you might want to survey on questions like these:

How common are positive and negative experiences with contractors?

Who is generally seen as having more control over a project: the general contractor or the subcontractors?

How much awareness is there over the project at issue, and have people formed opinions?

Two, Develop Fair and Effective Questions

I might be unusual in one way: Whenever I'm at home and I get a call asking if I want to take a survey, I always say "Yes," because I

want to hear how they frame the questions. And increasingly, I've noticed questions structured like this: *"If you learned that Senator Schlum had sacrificed his own illegitimate children in a Satanic ritual, how would that influence your support for Senator Schlum?"* That's an exaggeration, but the use of questionnaires to *influence* rather than just *measure* public opinion, the so called "push poll," has become a lot more common. Litigators, who are used to influencing and often adapt a more subtle version of that approach in their oral voir dire, can drift into that approach. That is another reason why questions should be drafted by an experienced public opinion researcher, and should be fair with no "push" one way or the other. Ultimately, you want questions that are neutral enough that they could be included in a draft supplemental juror questionnaire submitted to the court for use in voir dire.

Three, Sample the Venue

The next step is to work with a market research company to run your survey on a sample drawn from the community. How big a sample? Generally not as much as we would use if we were trying to predict the next presidential election, but it should be large enough to draw some statistically significant and meaningful associations. Around 300 respondents is typical for our group. There are two other additional considerations. One is that it matters how the sample is selected. An "opt-in" sample is not going to be representative: You want people who are contacted and agree rather than people who contact your recruiter and volunteer. A sample randomly drawn from the population (that is, not part of a pool that gets paid to take surveys) is vastly superior, and probably a precondition to being able to make reliable generalizations from the sample. The second consideration is that you don't want to risk tainting the eventual jury pool: If the summons have already gone out, screen potential respondents to exclude those who have received a summons for jury duty. If they have not, then make clear at the end of the survey that if they are called for jury duty and if they are questioned on issues having to do with the survey questions, they should share their experience as a part of the survey during voir dire.

Four, Understand and Apply the Results

When you get the results back, it is going to be a lot of tables and charts. It is purely descriptive and will be purely useless unless it is analyzed and applied. Remember at this stage that your goal is not to just understand the playing field. Rather your goal is to reduce uncertainty as you prepare for trial. If you have designed the survey well, you should be able to treat some answers as indicating a person who would be higher or lower risk for you at trial. With those questions treated as "dependent variables," you can next ask which "independent variables" work best in identifying the favorable or unfavorable potential jurors. In other words, if respondents reacted to a short thumbnail of your case scenario, you can analyze the data to look at the experiences or attitudes that are statistically associated with that response, and you can use that in voir dire.

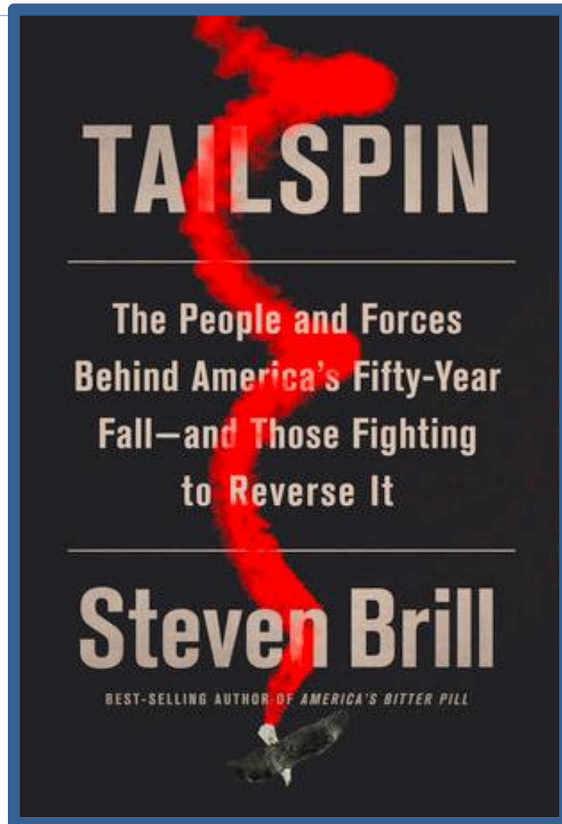
When preparing your case, knowledge is power. A community attitude survey is a good way to get that power, and ultimately to make your eventual jury much more knowable. Of course, it will never be perfectly predictable, but then again, neither are any of the alternatives to a jury. When it is accompanied by a thorough and honest attempt to understand and adapt to the community, persuading a jury becomes a lot more controlled than a roll of the dice.

An earlier version of this article was published in Persuasion Strategies' blog, *Persuasive Litigator* (www.persuasivelitigator.com)

Dr. Ken Broda-Bahm is a Senior Litigation Consultant for Persuasion Strategies, a service of Holland & Hart, based in Denver, Colorado.

Hot Off the Press: Steven Brill on the History and Horrors of Arbitration Clauses

By Anna Offit



Given the composition of the current Supreme Court, its recent 5-4 decision in Epic Systems Corp. v. Lewis, upholding arbitration clauses in employment contracts comes as no surprise. Coincidentally, in his book, Tailspin: The People and Forces Behind America's Fifty-Year Fall-and Those Fighting to Reverse It, written before that decision, Steven Brill gives a riveting account of the rise—and perils—or arbitration clauses in the early 20th century through the present.

Had it been published at the time Justice Ginsberg wrote her dissent in Epic, she would likely have cited to it. He opens this discussion by noting the federal rule changes in 1966 that made class action suits easier to bring at a time when there was public concern about the rights of consumers, customers, and product safety. A goal of these reforms, Brill explains, was to create an incentive for plaintiffs' lawyers to bring such cases, thus democratizing the civil legal system.

More class actions, however, meant greater *abuse* of class actions. Corporations were particularly vulnerable to frivolous suits— often preferring to settle bogus claims rather than risk bad press or unpredictable awards by juries. Corporate backlash against these suits was swift and aggressive.

A series of reforms were passed across the country that made it easier, for example, to move class actions from state to federal courts.

Significantly, in 1999, Brill describes the consortium of lawyers that convened to kill off class actions for good. How would they do this? By including boilerplate arbitration clauses in contracts that were signed by millions of average consumers every day. This included contracts signed by people who opened bank accounts, bought cell phones, and used credit cards. In addition to signing away their right to a day in court, consumers would unwittingly forfeit their ability to participate in class actions, too.

By 2008, arbitration clauses could be found in most standard employment agreements and consumer contracts alike. This included arbitration clauses that Wells Fargo put into the contracts of those opening bank accounts in 2016.

New Advisors Spotlight

Hon. Laurel Beatty Blunt
Franklin County Court of Common Pleas, Oklahoma

Hon. Karen Friedman
Baltimore City Circuit Court, 8th Judicial Circuit

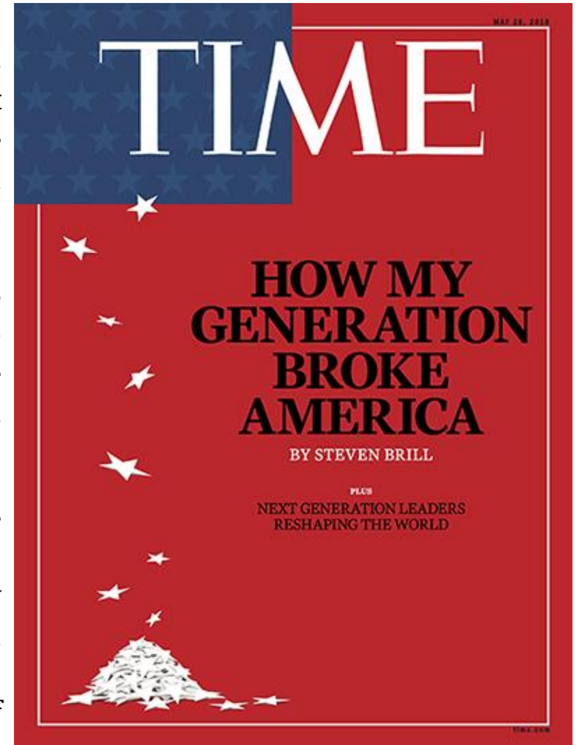
Hon. Richard Frye
Franklin County Common Pleas Court, Ohio

Hon. Wanda Keyes Heard
Baltimore City Circuit Court, 8th Judicial Circuit

Though Wells Fargo customers had discovered that fraudulent accounts had been opened without their knowledge, a federal court still ruled that the bank's arbitration clause was enforceable. The court went so far as to require that the plaintiffs' dispute about the *applicability* of the clause be resolved by arbitration, too.

The conceit of this opinion—and trend—, of course, was that consumers knew what they were getting themselves into. Brill argues that this is preposterous. Americans are not in the habit of reading the fine print. They do not pause to study legalese when buying presents online or renting cars. Furthermore, holding citizens to arbitration clauses can have outrageous effects. In the employment context, for example, they can prohibit workers from bringing suits in response to discrimination. The enforcement of these clauses, Brill explains, undermines the accessibility of civil courts for all.

Despite the efforts of consumer groups and others to infuse the fight against arbitration clauses with populist sentiment, banking industry lobbyists have continued to prevail. Most recently, on October 23, 2017, the House and Senate voted to repeal the consumer protection bureau's forced arbitration clause prohibition.



Here, as in many of the other examples Brill cites in his book, courts have allowed arbitration clauses to "un-level the playing field" in favor of corporate defendants by exploiting concern about overly litigious plaintiffs' lawyers. "[M]oats have been dug even around America's treasured courthouses," Brill contends, "to protect those with power." Tailspin takes readers on a tour of this (and other) features of the legal and political landscape that systematically undermine the autonomy of average citizens— including the laypeople we summon to sit on juries.

Anna Offit is a Research Fellow at the Civil Jury Project

Status of Project: Spring 2018

The Civil Jury Project looks forward to continuing its efforts throughout 2018 with the following objectives:

- Continue our efforts to enlist and involve judicial, academic, and practitioner advisors around the country
- Identify and study those judges who are trying the most jury cases, endeavoring to understand their techniques
- Develop plain language pattern jury instructions
- Encourage public discussion and debates about the pros and cons of public dispute resolution, particularly through the use of social and traditional media

This is a sampling of our objectives for the coming year. A comprehensive list is available on our website, here.

Thank you for your involvement in this important project. By working together we can reach a better understanding of how America's juries work and how they can be improved.

Contact Information

Civil Jury Project
NYU School of Law
Vanderbilt Hall
40 Washington Square
New York, NY 10012
Civiljuryproject@law.nyu.edu

Stephen Susman
Executive Director

Samuel Issacharoff
Faculty Director

Anna Offit
Research Fellow

Richard Jolly
Research Fellow

Kaitlin Villanueva
Admin. Assistant

A Preview of Next Month . . .

Judge Amy J. St. Eve and attorney Gretchen Scavo give an overview of their recent law review article, "What Juries *Really* Think: Practical Guidance for Trial Lawyers."

President of the Dallas Bar Association, Michael K. Hurst, discusses the urgent need to halt the decline of jury trials.